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No. 89-1817

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

COUNTY OF RIVERSIDE and COIS BYRD,
SHERIFF OF RIVERSIDE COUNTY,
Petitioners,

v.

DONALD LEE MCLAUGHLIN, et al.,
Respondents.

BRIEF AMICUS CURIAE OF THE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Where a state, pursuant to this Court's invitation in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 859 (1975) incorporates probable cause determinations for warrantless arrestees into existing pre-trial procedures such as arraignment that afford the arrestee additional constitutional protections, must the additional time necessary to provide these more extensive proceedings be factored into any determination as to whether the probable cause hearing is sufficiently "prompt" under Gerstein?

2. May a state, consistent with the requirements of the Fourth Amendment as interpreted by this Court in Gerstein v. Pugh, set a uniform outside period of two days, exclusive of Saturdays, Sundays and holidays, in which to provide warrantless arrestees with probable cause determinations, or must the constitutional

"promptness" of probable cause hearings depend upon the circumstances of each case and preclude the setting of any uniform outside time period in which to provide such determinations?

3. Does a plaintiff arrested without a warrant and allegedly held without receiving a constitutionally prompt probable cause determination possess Article III standing for purposes of obtaining an injunction requiring a public entity to provide warrantless arrestees with constitutionally prompt probable cause hearings when (a) the time in which to provide plaintiff with a constitutionally prompt hearing has passed and (b) there is no allegation that the plaintiff will again be subjected to the allegedly unconstitutional practices of the public entity?

This brief of amicus curiae addresses only questions 1 and 2.

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INTEREST OF AMICUS CURIAE

Amicus curiae, the State of California, has a comprehensive statewide pre-trial procedure which provides for prompt Gerstein v. Pugh, 420 U.S. 103 (1975) probable cause determinations.

The Ninth Circuit's decision, requiring probable cause determinations in Riverside County within 36 hours of arrest, requires an unnecessary and costly additional procedure, conflicts with existing state law, and precludes the State of California from adopting any uniform statewide procedure for probable cause determinations. If not overturned, the Ninth Circuit decision will require similar ad hoc factual determinations of promptness to be made in each of California's 58 counties.

SUMMARY OF ARGUMENT

California's existing pretrial procedure provides for prompt probable

cause determinations at arraignment and preliminary hearing.

The Ninth Circuit failed to give any consideration to California's pretrial procedure "viewed as a whole" (Gerstein v. Pugh, supra, 420 U.S. at p. 123), and incorrectly read Gerstein to require a probable cause determination after the time necessary to complete "the administrative procedures incident to the arrest," without regard to any other considerations. (McLaughlin v. County of Riverside, 888 F.2d 1276, 1278 (9th Cir. 1989).)

The Ninth Circuit's analysis is incompatible with the Court's recognition in Gerstein of the desirability for "flexibility" and "experimentation by the State's" concerning the timing of probable cause hearings. (Gerstein v. Pugh, supra, 420 U.S. at p. 123.) It is also inconsistent with the Court's conclusion

in Schall v. Martin, 467 U.S. 253 (1984), which upheld pretrial detention of a juvenile for up to six or seven days prior to receiving a probable cause determination.

The Ninth Circuit opinion imposes a costly duplicative layer of pretrial procedure, conflicts with existing California pretrial procedure, and effectively prevents the state from adopting any uniform statewide procedure for probable cause determinations.

Under the Ninth Circuit's rationale Federal District Courts will have to make ad hoc factual determinations for each of California's 58 counties, and perhaps additional determinations for particular areas within each county, as to how much time is necessary to complete "the administrative procedures incident to the arrest."

ARGUMENT

CALIFORNIA'S EXISTING PRETRIAL PROCEDURE PROVIDES FOR PROMPT PROBABLE CAUSE DETERMINATIONS IN COMPLIANCE WITH GERSTEIN V. PUGH, 420 U.S. 103 (1975)

The Court held in Gerstein v. Pugh, supra, 420 U.S. 103, that a person arrested and held for trial under a prosecutor's information was constitutionally entitled to a judicial determination of probable cause for extended pretrial restraint of liberty. (Id., at p. 114.)

Under the amended Florida procedure at issue in Gerstein, a person arrested without a warrant and charged by information could be jailed or subjected to other restraints "pending trial without any opportunity for a probable cause determination." (Gerstein v. Pugh, supra, 420 U.S. at p. 116, emphasis added.) The magistrate at the "first appearance" did not make a determination of probable

cause, and the Florida rule amendments changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that "no hearings are available to persons charged by information or indictment. (Citations)." (Gerstein v. Pugh, supra, 420 U.S. at p. 109.)[1]

Gerstein did not hold that a probable cause determination had to be made at a particular point in time prior to trial. The amended Florida procedures dealt with by the Court in Gerstein did not provide "any opportunity" for such a

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1. Under the former Florida procedural rules, the "only possible methods for obtaining a judicial determination of probable cause" were "a special statute allowing a preliminary hearing after 30 days" and arraignment, which the District Court found was "often delayed a month or more after arrest. (Citation)." (Gerstein v. Pugh, supra, 420 U.S. at p. 106.) As a result, even under the former rules a person charged by information could be detained under Florida law for "a substantial period solely on the decision of a prosecutor." (Ibid.)

determination pending trial. (Gerstein v. Pugh, supra, 420 U.S. at p. 116.) The Court stated only that the determination must be made by a judicial officer either before or "promptly" after arrest. (Id., at p. 125.)

Eschewing any particular procedure or fixed point in time for the determination of probable cause, the Court emphasized the "desirability of flexibility and experimentation by the States." (Gerstein v. Pugh, supra, 420 U.S. at p. 123.) The Court concluded that there was "no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." (Ibid.) Noting the variety of existing procedures, the Court observed that its holding would require only "minor adjustment" of the timing of existing procedures in some

states and perhaps no modification at all in others. (Gerstein v. Pugh, supra, 420 U.S. at pp. 124-125 [fns. omitted].)

Part of the reason underlying the Court's refusal to mandate a particular procedure or fixed time requirement was the Court's recognition of the differences in existing state pretrial procedures. Thus, the Court noted that some states, such as Alabama, provided an adversary "full preliminary hearing." (Gerstein v. Pugh, supra, 420 U.S. at pp. 119-120.) The Court also noted that the standard of proof, while usually referred to by the generic term "probable cause," may approach "a prima facie case of guilt" in some jurisdictions (Id., at p. 119), going beyond the protection afforded by the probable cause for arrest standard established by Gerstein (Id., at p. 120.)

While Gerstein did not mandate more than a minimal probable cause

procedure, neither did the Court in Gerstein mandate that states with procedures affording even greater rights to pretrial detainees than required by Gerstein must reduce their level of protection in order to afford an even "prompter" probable cause determination.

Instead, consistent with the concept of federalism, the Court expressed its approval of "flexibility and experimentation by the States" (Gerstein v. Pugh, supra, 420 U.S. at p. 123) in their efforts to comply with the Constitution.

Shortly after Gerstein was decided, the California Supreme Court specifically addressed the impact of Gerstein on California's procedures. In In re Walters, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975), the California Supreme Court carefully reviewed Gerstein and concluded that

California's then existing procedures governing the pretrial detention of those charged with misdemeanors who were arrested with or without a warrant "do not presently comport with our implementation of the constitutional requirements of Gerstein since the defendant is not afforded a post-arrest judicial determination that probable cause exists for his continued detention." (In re Walters, supra, 15 Cal.3d at p. 747, 126 Cal.Rptr. at p. 246, 543 P.2d at p. 614.) The court held that, unless waived, "a judicial determination of probable cause is required in every case where a defendant charged with a misdemeanor is detained awaiting trial." (Ibid.)

Walters held that a probable cause determination was required, on request, in all misdemeanor cases, whether or not the arrest was made pursuant to a warrant, notwithstanding the California

Supreme Court's recognition that in so holding it was going beyond Gerstein's strict requirements. (In re Walters, supra, 15 Cal.3d at p. 749, 126 Cal.Rptr. at p. 247, 543 P.2d at p. 615.)

Walters next considered the "structure" a Gerstein probable cause hearing should take. (In re Walters, supra, 15 Cal.3d at p. 750, 126 Cal.Rptr. 248, 543 P.2d 616.) The California Supreme Court expressed its preference for arraignment as the "most appropriate" stage of the misdemeanor proceedings to make the probable cause determination:

> "First, the determination of probable cause is to be made a matter of record at the time of arraignment or bail setting which usually takes place simultaneously within two days after a misdemeanor suspect's arrest (Pen. Code, §§ 822, 825)

unless bail is posted earlier in accordance with the warrant for arrest, if any, an order fixing bail, if any, or statutory schedules (Pen. Code, § 1269b). Although we consider arraignment to be the most appropriate stage of the proceedings at which to make a judicial determination of probable cause that the defendant is being properly detained, the parties may stipulate to a later determination or, for good cause, the court may continue the determination on defendant's motion therefor. However, it is incumbent upon the defendant to move the court to make or to continue the determination. His failure to do so at the time of arraignment, with notice of his

right thereto, will be deemed to constitute a waiver of that right." (In re Walters, supra, 15 Cal.3d at p. 750, 126 Cal.Rptr. at p. 248, 543 P.2d at p. 616, emphasis added.)

The California Supreme Court noted that a defendant "has a right to counsel at all stages of criminal proceedings (Cal. Const., art. I, § 15; Pen. Code, §§ 858, 859; In re Johnson, 62 Cal.2d 325, 329 [42 Cal.Rptr. 228, 398 P.2d 420] (1965))" and if he is so represented, "counsel would normally appear in a defendant's behalf during the probable cause determination," although "Gerstein does not compel such representation. (Gerstein v. Pugh, supra, 420 U.S. 103, 122 [43 L.Ed.2d 54, 70].)." (In re Walters, supra, 15 Cal.3d at p. 750, 126 Cal.Rptr. at p. 248, 543 P.2d at p. 616.)

Thus, California law as construed in Walters goes substantially beyond what Gerstein requires in providing for both the presence of the defendant and for counsel at an adversarial probable cause determination.

Walters involved a defendant accused of a misdemeanor, and the California Supreme Court noted that the procedures it required were "framed in terms of misdemeanor proceedings." (In re Walters, supra, 15 Cal.3d at p. 743 (fn. 2), 126 Cal.Rptr. at p. 243 (fn. 2), 543 P. 2d at p. 611 (fn. 2).) However, the California Supreme Court addressed felony procedure as well, and concluded that California's existing "procedures which provide for a preliminary hearing in the case of a felony charged by information fully comply with Gerstein requirements." (In re Walters, supra, 15 Cal.3d at p. 752

(fn. 8), 126 Cal.Rptr. at p. 249 (fn. 8), 543 P.2d at p. 617 (fn. 8).)

Under California law, both the defendant and the People in a felony case have the right to a preliminary examination "at the earliest possible time," and unless both waive that right or good cause for a continuance is found as provided for in Penal Code section 1050, "the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later." (Pen. Code, § 859b.)

If the defendant is in custody, the magistrate must dismiss the complaint "if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment or plea and the defendant has remained in custody for 10 or more court days" solely on that complaint, unless the defendant

"personally waives" his right to a preliminary examination within the 10 court days or the prosecution establishes good cause for a continuance beyond the 10 court day period. (Pen. Code, § 859b.)

In contrast, the Florida amended procedures at issue in Gerstein provided no right to a preliminary hearing for prosecutions by information. (Gerstein v. Pugh, supra, 420 U.S. at p. 109.) Moreover, the probable cause determination under California law takes place in the context of an adversarial proceeding with the presence of the defendant who is represented by counsel, protections which go substantially beyond the requirements of Gerstein.

In addition, "one accused of a felony can challenge the existence of probable cause by a motion pursuant to Penal Code section 995, and a hearing thereon would constitute, among other

things, a timely judicial determination of the existence of probable cause to detain pending trial. An accused's failure to so move will be deemed to constitute a waiver of his right to such a determination." (In re Walters, supra, 15 Cal.3d at p. 752 (fn. 8); 126 Cal.Rptr. at p. 250 (fn. 8), 543 P.2d at p. 618 (fn. 8), emphasis added.) In contrast, Florida law provided no means by which the defendant prosecuted by information could challenge the existence of probable cause pending trial. (Gerstein v. Pugh, supra, 420 U.S. at p. 116.)

In response to Walters, the California Legislature enacted Penal Code section 991 (People v. Ward 188 Cal.App.3d Supp. 11, 15, 235 Cal.Rptr. 287 (1986)), which codifies the procedures suggested in Walters for misdemeanor arrestees. Penal Code section 991 requires a determination

of probable cause at the time of arraignment, on request by the defendant:

"(a) If the defendant is in custody at the time he appears before the magistrate for arraignment and, if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate, on motion of counsel for the defendant or the defendant, shall determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty thereof.

"(b) The determination of probable cause shall be made immediately unless the court grants a continuance for good cause not to exceed three court days.

"(c) In determining the existence of probable cause, the magistrate shall consider any warrant of arrest with supporting affidavits, and the sworn complaint together with any documents or reports incorporated by reference thereto, which, if based on information and belief, state the basis for such information, or any other documents of similar reliability.

"(d) If, after examining these documents, the court determines that there exists probable cause to believe that the defendant has committed the offense charged in the complaint, it shall set the matter for trial.

"If the court determines that no such probable cause exists, it shall dismiss the complaint and discharge the defendant.

"(e) Within 15 days of the dismissal of a complaint pursuant to this section the prosecution may refile the complaint.

"A second dismissal pursuant to this section is a bar to any other prosecution for the same offense." (Pen. Code, § 991.)

By statute in California, arraignment before a magistrate must take place "without unnecessary delay, and, in any event, within two days" after arrest, "excluding Sunday and holidays," with the proviso that when the two day period expires "at a time when the court in which

the magistrate is sitting is not in session," the time is extended "to include the duration of the next regular court session on the judicial day immediately following." (Pen. Code, § 825, subd. (a)(1).[2/] See also Pen. Code, § 849, subd. (a) [when an arrest is made without a warrant, the person arrested, if not otherwise released, shall be taken "without unnecessary delay" before a

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2. There is a conflict among California Courts of Appeal as to whether the term "two days" means "48 hours" from the time of arrest (see People v. Chambers (1969) 276 Cal.App.2d 89, 80 Cal.Rptr. 672; People v. Lee (1970) 3 Cal.App.3d 514, 521, 83 Cal.Rptr. 715, cert. denied, 402 U.S. 999 (1971); People v. Ross (1963) 236 Cal.App.2d 364, 368, 46 Cal.Rptr. 41) or two "calendar" days from the time of arrest (see majority and dissenting opinions in Youngblood v. Gates (1988) 200 Cal.App.3d 1302, 246 Cal.Rptr. 775). This conflict is not critical here, since even the two "calendar" day interpretation would not, in the view of amicus, contravene Gerstein. Moreover, the 36 hour period affirmed by the Ninth Circuit in this case could be violated under either interpretation of state law.

magistrate and a complaint stating the charge against the arrested person shall be laid before such magistrate].)

The California provisions on arraignment "do not authorize a two-day detention in all cases." (People v. Thompson, 27 Cal.3d 303, 329, 165 Cal.Rptr. 289, 303, 611 P.2d 883, 897 (1980).) The two day period is the outside limit on what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is "'in violation of the statute' and of the Constitution." (Ibid.)[3/]

The Ninth Circuit simply ignored existing California procedure "viewed as a

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3. Article I, section 14 of the California Constitution mandates that persons accused by felony complaint be taken "without unnecessary delay" before a magistrate. (People v. Thompson, supra, 27 Cal.3d at p. 329, 165 Cal.Rptr. at p. 303, 611 P.2d at p. 897.)

whole" (Gerstein v. Pugh, supra, 420 U.S. at p. 123) in concluding that Gerstein mandates probable cause determinations "as soon as the administrative steps incident to arrest were completed" (McLaughlin v. County of Riverside, supra, 888 F.2d 1276, 1278), i.e. within 36 hours from the time of arrest.

The Ninth Circuit misconstrued Gerstein in reaching its conclusion. The Court in Gerstein referred to a policeman's on-the-scene assessment of probable cause as justifying the arrest of a person and "a brief period of detention to take the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at pp. 113-114), but did not hold that this period was the maximum permissible time that could elapse before a magistrate's subsequent determination of probable cause. To the contrary, in discussing when the magistrate's

determination of probable cause should be made, the Court engaged in an extended discussion, emphasized that "state systems of criminal procedure vary widely," and concluded that since there was "no single preferred pretrial procedure" the nature of the probable cause determination "usually will be shaped to accord with a State's pretrial procedure viewed as a whole." (Gerstein v. Pugh, supra, 420 U.S. at p. 123.)

If the Court had intended to require a probable cause determination by a magistrate immediately after the brief period of detention necessary to take "the administrative steps incident to arrest," the Court's discussion of the wide variety of "state systems of criminal procedure" was irrelevant. The time necessary to take "the administrative steps incident to arrest" can be calculated, just as the District Court did here, without reference

to the wide range of "state systems of criminal procedure." Nor does the Court's statement in Gerstein that there is "no single preferred pretrial procedure" make sense if the Court meant to mandate a probable cause determination by a magistrate as soon as "the administrative steps incident to arrest" have been completed. Likewise, the Court's ultimate conclusion that the nature of the probable cause determination usually will be shaped to accord "with a State's pretrial procedure viewed as a whole" loses all meaning if the Court intended to mandate a probable cause determination by a magistrate as soon as "the administrative steps incident to arrest" have been completed. Consideration of a state's "pretrial procedure viewed as a whole" only has significance if the Court did not intend to mandate a magistrate's determination of probable cause as soon as

"the administrative steps incident to arrest" have been completed.

In concluding that only the time necessary to complete "the administrative steps incident to arrest" need be considered, the Ninth Circuit failed to give any consideration whatever to California's pretrial procedure "viewed as a whole" (Gerstein v. Pugh, supra, 420 U.S. at p. 123), and instead made an ad hoc determination that permitting "as much as forty-eight hours plus an intervening Sunday or holiday to elapse before the determination is made" is not in accord with Gerstein's requirement of a determination "'promptly after arrest.'" (McLaughlin v. County of Riverside, supra, 888 F.2d at p. 1278.)

This approach simply ignored the conclusion of the California Supreme Court in Walters, which declared the time of arraignment in misdemeanor cases to be

"the most appropriate stage of the proceedings at which to make a judicial determination of probable cause that the defendant is being properly detained . . ." (In re Walters, supra, 15 Cal.3d at p. 750, 126 Cal.Rptr. at p. 248, 543 P.2d at p. 616.)

Even assuming that a fixed number of hours following arrest, rather than a particular stage of the pretrial proceedings, was the appropriate focus, the conclusion of the Ninth Circuit is incompatible with Schall v. Martin, supra, 467 U.S. 253, where the Court upheld a New York statute authorizing pretrial detention of an accused juvenile delinquent for up to six or seven days prior to receiving a probable cause determination. Under the New York Statute at issue in Schall, if the juvenile was detained at his initial appearance and denied the charges, he was entitled to a

probable cause hearing to be held "not more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner," and for good cause shown the hearing could be adjourned for up to three additional court days. (Schall v. Martin, supra, 467 U.S. at p. 270 and fn. 19.)

The Court noted in Schall that Gerstein did not "mandate a specific timetable" for a probable cause determination. (Schall v. Martin, supra, 467 U.S. at p. 275.) The Court reemphasized its concern with "flexibility" and "informality," while at the same time ensuring adequate predetention procedures. (Ibid.)

Not only did the Court in Schall find a delay of up to six or seven days to be constitutionally inoffensive, but the Court observed that this "brief delay" in

the probable-cause hearing 'may actually work to the advantage of the juvenile since it gives his counsel, usually appointed at the initial appearance pursuant to FCA section 320.2(2), time to prepare." (Schall v. Martin, supra, 467 U.S. at p. 277, fn. 28.) The same is true under California procedure, and requests for continuances by defense counsel have been frequent under California law.

The New York procedures at issue in Schall provided additional adversary procedural protections beyond that mandated for the probable cause hearing in Gerstein, as do California pretrial procedures. (Schall v. Martin, supra, 467 U.S. at p. 275.) The Court evaluated the delay in the probable cause determination in the context of the overall procedures provided under New York law (Id., at pp. 275-277), in holding a possible delay of six or seven days permissible. California

provides for the presence of the defendant and his representation by counsel in an adversarial setting, protections which go considerably beyond the minimum requirements of Gerstein, and which support the reasonableness of the delay under California law.

Under existing California law arraignment must take place "without unnecessary delay" and within a maximum of two days after arrest (excluding Sundays and holidays). As previously noted, the two day statutory period is the outside limit on what may be considered a necessary delay, and a detention of less than two days, if unreasonable under the circumstances, is "'in violation of the statute' and of the Constitution." (People v. Thompson, supra, 27 Cal.3d 303, 329, 165 Cal.Rptr. 289, 303, 611 P.2d 883, 897.)

Thus, the flat 36 hour rule adopted by the District Court and upheld by the Ninth Circuit will provide little in the way of promptness over existing California law, but will do much to disrupt and unsettle existing state pre-trial procedure.

The destabilizing effect of the Ninth Circuit's decision is emphasized by the fact that there are now different probable cause procedures and time requirements in effect in California. In the County of Santa Clara, a non-adversary probable cause hearing must be held, pursuant to District Court order and Ninth Circuit decision, within 24 hours after arrest. (Bernard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983).) In Orange County, a non-adversary hearing must be held within 36 hours of arrest, pursuant to a stipulated order and judgment resulting from another District Court

case, Scott v. Gates, CV 84-8647-RG (C.D. Cal. Oct. 3, 1988.) San Bernardino County is likewise subject to a District Court judgment requiring a non-adversary 36 hour probable cause hearing. Leaving aside Riverside County (the subject of the instant case), the remaining California counties are subject to state law as to the timing and adversary nature of probable cause determinations.

If the judgment in the instant case is not overturned, under the Ninth Circuit's rationale District Courts will have to make ad hoc factual determinations for each of these remaining 54 California counties as to how much time is necessary to complete "the administrative procedures incident to the arrest." (McLaughlin v. County of Riverside, supra, 888 F.2d at p. 1278.) Different factual determinations already have been and presumably will continue to be made in different counties.

In fact, there could be different factual determinations made by a District Court within a particular county. This potential was expressly recognized by the Ninth Circuit in its opinion. In upholding the reasonableness of the 36 hour rule adopted by the District Court, the Ninth Circuit noted that the District Court rule applied only to "inmates at the Riverside County Central Jail," and that the District Court "purposefully did not set any fixed time limit for Riverside's implementation of satisfactory determination procedures in other parts of the County." (McLaughlin v. County of Riverside, supra, at pp. 1278-1279; emphasis added.) This strongly suggests that the District Court is free, under the Ninth Circuit's understanding of Gerstein, to set different time periods for different parts of the same county.

It is not even clear to amicus whether under the Ninth Circuit decision a defendant would be entitled to <u>two</u> probable cause determinations: the 36 hour non-adversary determination mandated by the District Court, and the adversary determination provided for by California law. A defendant's statutory right under California law to an adversary probable cause determination at which he is present and represented by counsel is separate from the non-adversary procedure mandated by the District Court and approved by the Ninth Circuit.

The net effect of the Ninth Circuit's reasoning is not only to undermine existing California statutory procedure, but also necessarily to preclude <u>any</u> uniform statewide procedure for probable cause determinations. Instead, under the Ninth Circuit's view, a series of ad hoc factual determinations

will have to be made by District Courts for each county, and possibly within each county. The Ninth Circuit's approach seriously intrudes on the ability of the State of California to establish and regulate a uniform statewide pretrial procedure for probable cause determinations.

The Court's recognition in Gerstein of the desirability of "flexibility" and "experimentation by the States" belies the approach taken by the District Court and the Ninth Circuit here. The ad hoc 36 hour rule adopted by the District Court and sanctioned by the Ninth Circuit was adopted without reference to California's "pretrial procedure viewed as a whole" (Gerstein v. Pugh, supra, 420 U.S. at p. 123) and is manifestly at odds with the opinion expressed by the Court in Gerstein, and with the conclusion reached

in Schall. The Ninth Circuit's decision should, accordingly, be reversed.

CONCLUSION

For the foregoing reasons, amicus curiae urges that the decision of the Ninth Circuit be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

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COUNTY OF RIVERSIDE and COIS BYRD,
SHERIFF OF RIVERSIDE COUNTY,
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v.

DONALD LEE MCLAUGHLIN, et al.,
Respondents.

FREDERICK R. MILLAR, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; that on November 8, 1990, he caused to be served a true copy of the attached Brief of the State of California as Amicus Curiae in the above-entitled matter, on counsel for Petitioners and counsel for Respondents by having the same placed in an enveloped addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Diego, California, with first class postage thereon fully prepaid.

Frederick R. Millar Jr.

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